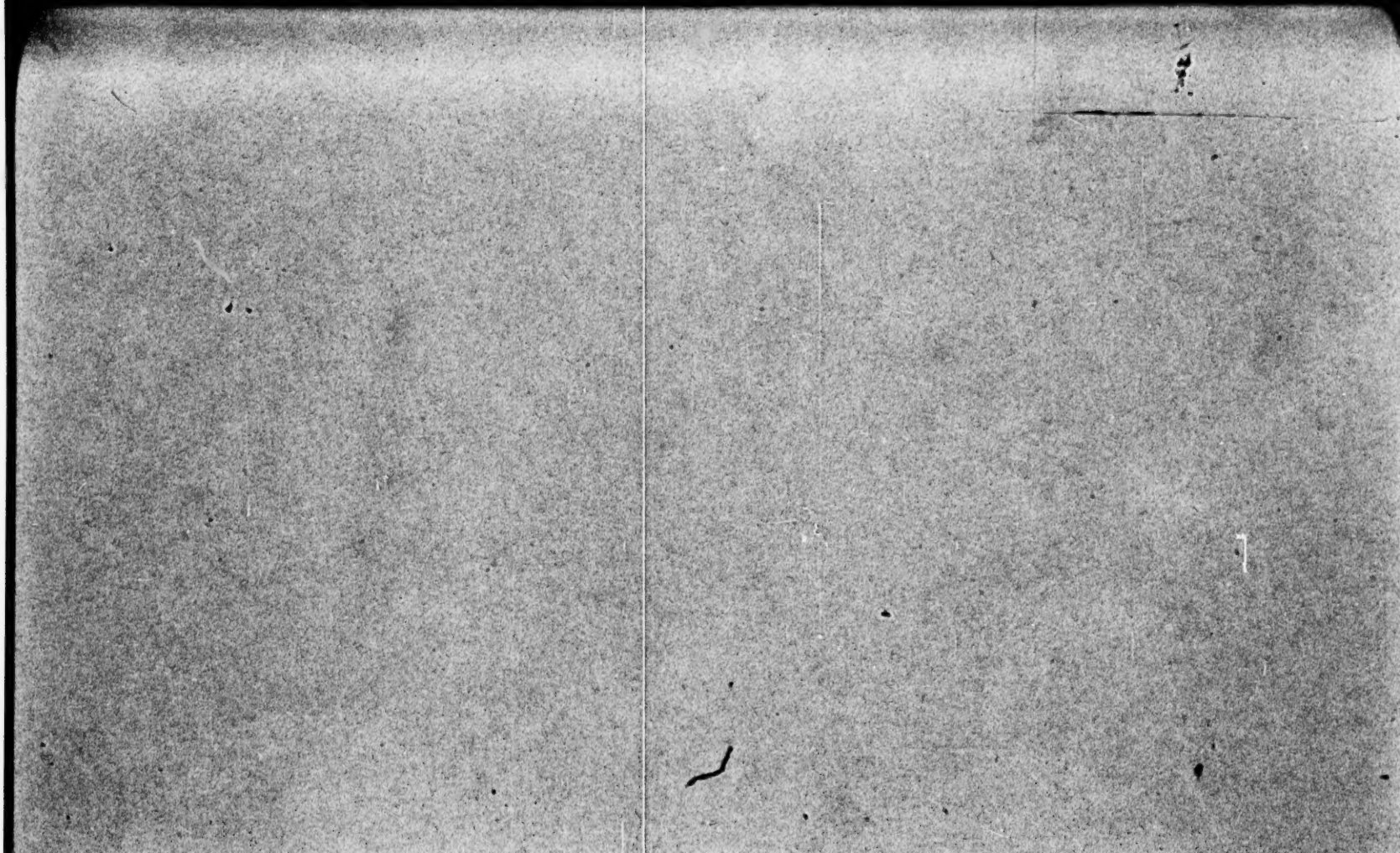

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 448

AARON PRUSSIAN

—against—

THE UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR AARON PRUSSIAN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 448.

AARON PRUSSIAN

—against—

THE UNITED STATES OF AMERICA.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, in this case, is reported in 42 Fed. (2d) 854.

Statement of the Case.

In February, 1929, the Grand Jury for the Eastern District of New York returned an indictment charging petitioner with (1) forging an obligation of the United States, and (2) uttering the same (R. 5). A demurrer to said indictment was filed and overruled (R. 8, 9) and the case was thereafter moved for trial, during which the second count was dismissed by the Trial Judge (R. 89). Petitioner was convicted of the offense charged in said first count (R. 93), and was sentenced to imprisonment of five years and a fine of $200 (R. 94). The judgment was affirmed by the Circuit Court of Appeals (1930, C. C. A. 2) 42 Fed. (2d) 854. Thereupon application for a writ of certiorari was

made to this Honorable Court, which writ was granted on October 20, 1930, and is reported in 51 S. Ct. In the order allowing certiorari, the Court limited the question to whether the indictment states an offense under the Criminal Code.

Specification of Assigned Error Intended to be Urged.

The assigned error intended to be urged is accordingly limited to the proposition that said indictment does not state an offense under the Criminal Code.

ARGUMENT.

Introduction and Summary.

The indictment, narrowed, charges that petitioner forged "a certain obligation of the United States, to wit: the *indorsement*" on a draft for $9,044.37 which had been drawn by one, J. L. Summer, disbursing clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, "which said draft was an obligation of the United States". (The face of the check or draft, and also the reverse side thereof with the several indorsements, is fully set forth.) The said indictment then charges that "said draft for money was *duly issued* to the said Malcolm S. Mackay * * * and thereafter the defendant * * * did then and there falsely forge the endorsement on the said draft by falsely forging the name of the payee, to wit: the words 'Malcolm S. Mackay' on the back (thereof); *that the said draft for money with the forged endorsement thereon did*

*together constitute a forged obligation of the United States * * **".

The only statute which punishes the forgery of the government obligation described in said indictment is section 148 of the Criminal Code, under which the indictment purports, and is claimed, to have been drawn. Said section (now 18 U. S. C. A. sec. 262) is in the following language:

> **"Counterfeiting securities.** Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than 15 years."

The words "obligation or other security of the United States" are defined in the preceding section, 147 (now 18 U. S. C. A. sec. 261), as follows:

> **" 'Obligation or other security of the United States' defined.** The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

The draft described in the indictment is, admittedly, an "obligation or other security of the United States" within the meaning of section 147.

Questions Presented.

1. Does the forgery of Mackay's *indorsement* amount to a *forging of an obligation* of the United States, as charged?

2. Does the genuine draft, with a forged indorsement thereon, constitute (together) a *forged* obligation of the United States, as charged? And

3. Is the indictment sufficient as a pleading under the Criminal Code?

Part I of this argument deals with the first two questions. The history of section 148, and the decisions of this Court, show that said section punishes the crime of *counterfeiting* as contra-distinguished from the crime of forgery. The use of the word "*forge*", when applied to any obligation or security of the Government, implies that it *purports* to be such an instrument and to have been *duly issued* but, in fact, is not, and never was, genuine or valid. The forgery of an *indorsement* does not amount to a *forging of the draft itself*, which is the sole act of the Government, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the instrument, and amounts to nothing more than the assignment of a mere chose in action. The statute deals with forfeitable property, and not with *indorsements* of negotiable instruments.

Part II of this argument will consider the decisions relied upon by the Circuit Court in this case, in order to show the errors therein. Said decisions (1) interpret the word "obligation" as meaning a debt or a duty instead of recognizing that Congress has legislated in section 147 of the Criminal Code what the word "shall

be held to mean"; (2) they interpret the statute as directed against the crime of "forgery" as distinguished from "counterfeiting"; (3) they erroneously rely upon cases which are not authority for their conclusions; and (4) their rulings are contrary to authoritative decisions of this Court.

Part III is directed to the proposition that the indictment is insufficient as a pleading under the Criminal Code. A summary of the allegations in said indictment are (1) Prussian counterfeited an "obligation of the United States"; (2) the "obligation" which he counterfeited was the "indorsement" upon a draft for money; (3) the said draft was an obligation of the United States and was duly issued; (4) Prussian forged Mackay's name on the back thereof; and, (5) the said draft was not a counterfeited obligation, nor was the indorsement alone a counterfeited obligation, but together they constituted a forged obligation of the United States. These allegations are repugnant; they are uncertain, and do not inform the accused exactly of what he is charged. The indictment lacks that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution.

I. The indictment does not sufficiently describe any forged obligation of the United States, nor does it sufficiently describe the forging thereof.

In construing section 148 of the Criminal Code, it is appropriate to refer to its history which we think will throw great light on the intention of Congress, and the meaning of the word *forged*, as used in said section.

By virtue of the express power granted to Congress

"to provide for the punishment of counterfeiting the Securities and current Coin of the United States" (Constitution, Art. 1, sec. 8, cl. 6), it was provided in the first crimes Act that the counterfeiting of public securities should be punishable by death. Act April 30, 1790, section 14 (1 Stat. 112, 115), so far as here material, was in the following language:

> "And be it (further) enacted, That if any person or persons shall falsely make, alter, forge or counterfeit, * * * any certificate, indent or other public security of the United States, * * * and shall be thereof convicted, every such person shall suffer death."

With the issuance of other securities by Acts of Congress, penal provisions were placed in each of said Acts to guard the public from false and counterfeit paper, purporting on its face to be the obligation or security authorized to be issued. These provisions contained two changes from the original crimes Act; first, capital punishment was changed to fine and imprisonment, and, second, a separate clause was created to punish the alteration of genuine instruments.

Thus, in section 11 of the Act of February 24th, 1815 (3 Stat. 213, 215), authorizing the issuance of treasury notes in a sum not exceeding $25,000,000, we find this language:

> "And be it further enacted, that if any person shall falsely make, forge, or counterfeit, * * * any note, in imitation of, or purporting to be, a treasury note as aforesaid; or shall falsely alter, * * * any treasury note *issued* as aforesaid; or shall pass, * * * as true, any false, forged or counterfeited note, purporting to be a treasury

> note as aforesaid, knowing the same to be falsely made, forged or counterfeited; or shall pass * * * as true, any falsely altered treasury note *issued* as aforesaid, knowing the same to be falsely altered, * * * every such person shall be deemed and adjudged guilty of felony; and being thereof convicted by due course of law, shall be sentenced to be imprisoned * * *." (Italics ours.)

It is to be noted that the first clause penalizes one who shall *forge any note, in imitation of, or purporting to be, a genuine treasury note*, whereas the second clause punishes the alteration of any treasury note *issued* as aforesaid. The same distinction appears in the third and fourth clauses of said section. The omission of the word "*issued*" from the first and third clauses discloses that the words *falsely make, forge or counterfeit* were intended to apply to instruments which, in their very inception, had been falsely conceived, and were not intended to apply to instruments which had been *issued* by the Government.

Said section 11 of Act February 24, 1815, again appeared in section 18 of Act April 10, 1816, incorporating the Bank of the United States (3 Stat. 266, 275). The only changes were those which were necessary to adapt the provisions to the bills, notes, orders, or checks of said bank. Two noteworthy cases arose under this section. In *United States* v. *Turner* (1833), 32 U. S. 132, 7 Pet. 132, 8 L. Ed. 633, the accused was charged with forging the names of officers of the bank as the *makers* of the notes of said bank. In discussing the construction to be given to section 18 of said Act, Mr. Justice Story said (p. 136, 32 U. S.):

> "The object is to guard the public from false

and counterfeit paper, purporting on its face to be issued by the bank."

The other case was *U. S.* v. *Stewart* (1818), in which Mr. Justice Washington, of this Court, while sitting in Circuit, was called upon to determine whether the forgery of an *indorsement* upon a genuine post note of the bank of the United States was an offense within the meaning of said section. 4 Wash. C. C. 226 (Fed. Cases 16402). The Court fully analyzed the statute and concluded that the case was not within the Act of Congress. Inasmuch as the opinion in that case is the only definite ruling ever made by a Justice of this Court upon the identical question which is here involved, it is here set forth in full:

"There are two motions before the court: 1. For a new trial; and 2. In arrest of judgment. The indictment contains 4 counts. The two first are for forging a bill or note of the Bank of the United States, and for attempting to pass the same. The third is for falsely making and counterfeiting an order on the same bank, indorsed by the defendant upon the said bill, as follows, viz: 'Pay William Weston or order', signed 'John Thornton'. The fourth is for falsely altering a bill or note of the said bank, by the same indorsement.

The bill or note, stated in the indictment, and given in evidence, is a post note of the Bank of the United States, payable to William Jenner & Co. or order, for $100 with the following indorsement on the back of it, viz: 'Pay Mackie, Milner & Co. or order,—William Jenner & Co.' 'Pay William Jenner & Co. Mackie, Milner & Co.—William Jenner & Co.' 'Pay Churchman & Thomas or order—D. Bell.' 'Pay William Morton or order—John Thornton.'

The forgery of the last indorsement by the defendant was fully proved.

The evidence which was given at the trial, applied only to the third count; and the question is, whether the false indorsement made by the defendant, is an offense within the eighteenth section of the law for incorporating the subscribers to the Bank of the United States, passed the 10th of April, 1816.

It is perfectly clear, I think, that it does not amount to a forgery, or alteration of *the bill or note itself,* which is the sole act of the corporation, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the note.

Does the indorsement upon a note or bill of exchange, requiring the contents to be paid to a third person, amount to an order, within the meaning and intent of the Act of Congress? I think not. A bill of exchange is said to be an order by the drawer upon the drawee, to pay the contents to the payee. It is also, and with equal propriety, called an assignment to the payee of so much money in the hands of the drawee. I am not disposed to fall out with either of these definitions.

But there can be no doubt, that the indorsement upon a bill or a note, directing the contents to be paid to an indorsee, amounts to nothing more than the assignment of a mere chose in action; and whether it be made in the form of an assignment, or of an order, its nature is the same. That the act did not intend, by the word *order,* to include an assignment of a bank note, may be fairly presumed from the word *check,* with which it is associated; the latter meaning in common parlance, a draft payable to *bearer,*

and it was on that account, probably, that the word was added.

I am strongly confirmed in this construction of the Act of Congress, by observing, that the statutes of England against forgery of negotiable papers of almost every kind, extend, by express words, to the indorsement made on them. Such, for instance, is the statute of 15 Geo. II c. 13, against forging the notes of the bank of England, or bills of exchange, or bonds under the seal of the corporation, *or any indorsement thereon.* Such are the statutes of 12 Geo. I c. 2 as to East India bonds; 12 Geo. I c. 32, as to the moneys of suitors in chancery; 42 Geo. III c. 1, as to exchequer bills; and 2 Geo. II c. 25, as to deeds, bonds, bills, notes, or receipts. And it is observable that the statute of 45 Geo. III c. 88, not only includes the forgery of bills and notes, and the indorsements or assignments thereof, but also any warrant or order, for payment of money.

I admit that these provisions in the English statutes, are by no means conclusive of this point. But as the nature of negotiable paper is as well understood in England, as in any country in the world, the care taken in those statutes to punish forged indorsements, proves at least, that the legislature of that country has not thought that the word *order* would be sufficient for the purpose.

As the evidence at the trial applied only to the indorsement, which in the opinion of the court is not an offense within the act of Congress, the judgment must be arrested." (Italics by the Court.)

Although said decision is reported as a Circuit Court case, it is to be borne in mind that Mr. Justice Washing-

ton was one of the Justices of this Court assigned to hold court twice a year in one of the three then existing Circuits. In those days, it was through the contact of the Justices of this Court with the Judges sitting in the Circuit Courts, that the people of the country became acquainted with the new institution, the Federal Judiciary; and it was largely through these Justices that the fundamental principles of the new Constitution and Government, and the provisions of the Federal statutes and definition of the new criminal legislation became known to the people. Warren on History of the United States Supreme Court (1922), Volume 1, page 58.

The decision by Mr. Justice Washington was rendered but two years after the passage of the Act of April 10, 1816. It constituted the definition of new criminal legislation, and must have become known to Congress, especially in view of the fact that the public securities, indents, checks, etc., were not issued in vast volume, for it then was still practicable that they be signed by the hand manual of the officers authorized to sign and countersign.

Is it not reasonable to believe that, if such decision did not interpret the statute in conformity with the intention of Congress, it would have re-enacted the law so as to make express provision for the forgery of an indorsement upon the post notes and checks of said bank? And is not the failure of Congress to thus re-enact the statute conclusive on the proposition that they did not intend that the forgery of an *indorsement* be embraced within the section, and that the decision accurately reflected and interpreted the legislative intent?

This conclusion is supported by the crimes Act, March

3, 1825. In section 17 of said Act (4 Stat. 115, 119), which section corresponds to section 18 of Act April 10, 1816, Congress embraced all the obligations and securities which had been theretofore authorized to be issued, and which included, of course, the bills, notes, orders, and checks of the bank of the United States. Said section 17, so far as applicable, was in the following language:

> "That, if any person or persons shall falsely make, forge, or counterfeit * * * any paper, writing, or instrument, in imitation of, or purporting to be, an indent * * * or other public security of the United States * * * or any bill, check, or draft for money, drawn by, or on the treasurer of the United States, or by, or on, any other public officer or agent of the United States, * * * shall be deemed guilty of a felony * * *."

The meaning of this language is plain, and is not susceptible of conflicting constructions. The word *forge* clearly and expressly relates only to an instrument *in imitation of, or purporting to be,* a genuine one. The clause penalized the counterfeiting of *the draft itself*, and obviously had no application whatever to a genuine draft or to a fraudulent *indorsement* thereon. To put it another way, the section penalized the *counterfeiting of the writings of the Government* as distinguished from *forging the writings of an individual.* This, in effect, was the construction of the prior statute by Mr. Justice Washington in the *Stewart* case.

The counterfeiting section of said Acts continued to be copied in each of the subsequent Acts of Congress relating to government obligations and securities, and in the revisions of said Acts, with only such immaterial

changes as were necessary to adapt the language to the particular instruments referred to in said Acts.

> 5 Stat. 201, 203 (Act October 12, 1837, sec. 10);
> 9 Stat. 118, 120 (Act January 28, 1847, sec. 9);
> 11 Stat. 257, 259 (Act Dec. 23, 1857, sec. 12).

In the first Act authorizing the issuance of greenbacks, Act February 25, 1862, section 6 (12 Stat. 345, 347), the form of the language was changed and the word *alter* was placed in the same clause with the words *falsely make, forge, counterfeit*. Said section, so far as material, was enacted in the following language:

> "That if any person or persons shall falsely make, forge, counterfeit or alter * * * any note, bond, coupon, or other security issued under authority of this Act, or heretofore issued under Acts to authorize the issue of treasury notes or bonds; * * * shall, on conviction thereof, be punished by fine * * * and by imprisonment * * *."

The case of *United States* v. *Howell* (1870), 78 U. S. 432, 11 Wall. 432, 20 L. Ed. 195, arose under that section. The defendant in that case contended that the Act itself was void for repugnancy, and that the passing of a *false, forged and counterfeited* note, was not made an offense because the section related only to such notes as had been *issued* under authority of one of said Acts. In discussing the purpose of the Act, and the meaning of the words *false, forged, counterfeit,* Mr. Justice Miller held (p. 436, 78 U. S.):

> "There is some degree of plausibility in this hypercriticism at first blush, which, if it were

sound, would make the Act void for want of any meaning, a result which one of the first canons of construction teaches us to avoid if possible, and which is at war with the common sense which assures us that *the purpose of the Act was to punish the making of counterfeits of the notes or bonds described in the statute.* Nor is the criticism philologically just. The offense is described as the passing of false, forged, or counterfeited notes or bonds issued under the authority of the statute. We are to give due weight to all the words implied in describing the instrument, and cannot reject the words *false, forged,* and *counterfeited* if it is possible to adopt any reasonable construction which will permit them to stand. This is done by mentally supplying the ellipsis which is in general use in conversation or in writing in similar cases * * *. Now, if the paper spoken of is a forgery it is not a bank note, which means an obligation of some bank to pay money. But here also the mind supplies the ellipsis which good usage allows, and understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note * * *.

The use of the words false, forged, and counterfeit in the statute, implies, therefore, when applied to any of the obligations of government mentioned, that it purports to be such an instrument, but is not genuine or valid. And so are the authorities. See 2 Russell on Crimes, 801; East, Pleas, Crown, 950." (Italics ours.)

The language of the opinion is very plain, and is easily understood. It was stated that the purpose of the Act was to punish the making of a certain class of instru-

ments, to wit; *counterfeits of the notes or bonds.* In the present indictment, it is charged that the draft which was forged was genuine and duly issued by the Government. There is an obvious distinction between counterfeiting and forgery in the subject matter of the offenses. "Counterfeiting" relates to the currency and obligations of the Government; "forgery" relates to any writing which operates as the foundation of another man's liability or the evidence of his right. 15 Corpus Juris 357. The term "counterfeit", both by its etymology and common intendment, signifies the fabrication of a false image or representation. *United States* v. *Marigold* (1850), 50 U. S. 560, 9 How. 560, 13 L. Ed. 257. "As thus defined, counterfeiting includes forgery", 7 Ruling Case Law 913, but "forgery does not include the crime of counterfeiting". 12 Ruling Case Law 139.

It is suggested that the word *forged*, as used, was intended to embrace an act which was a part of the counterfeiting, because the obligations and securities, when they came from the plates were blank as to signature and were required to be signed in behalf of the United States by the Treasurer thereof and countersigned by the Register of the Treasury.

In the course of the Civil War, however, the notes, bonds and other securities of the Government came to be issued in such vast volume that it was found to be wholly impracticable to have each of them signed by the hand manual of the authorized officers of the Treasury Department. For this reason the practise of using engraved signatures was adopted in the Act of June 30, 1864, section 6, with other provisions for "*the imprint of the seal of the Treasury Department as a further evidence of lawful issue*"; and for "*such other device*

or safeguard against counterfeiting as the secretary may approve" (13 Stat. 221, c. 172).

In section 13 of said Act we find, for the first time, the words "obligation or other security of the United States", and that they "shall be held to include and mean" those instruments which now are contained substantially in section 147 of the Criminal Code, and which instruments had been authorized to be issued under the prior Acts of Congress. The definition included "checks for money of authorized officers of the United States."

Section 10 of said Act embodied the penal provisions contained in section 6 of the Act of February 25, 1862, and now found, substantially, in sections 148 and 151 of the Criminal Code. So far as it relates to section 148, its language is almost identical for it provided for the punishment of any person who shall "falsely make, forge, counterfeit or alter any obligation or security of the United States".

Section 10 of Act June 30, 1864 was placed in the Revised Statutes as section 5413 (definition clause); section 13 of said Act was broken up and placed in the Revised Statutes as sections 5414 (counterfeiting), and 5431 (passing, uttering, possession). In construing section 5413 of the Revised Statutes the Attorney General has held that the context manifestly evidenced the intention of Congress to apply the provisions of that section to the construction of the sections that follow, and the history of section 5413 and its associated origin with the succeeding sections, under the ordinary rules of statutory construction, make this perfectly plain.

22 Opinions of Attorney General, 40, 43;
26 Opinions of Attorney General, 231, 233.

Section 5431 of the Revised Statutes was construed by this Court in *Dunbar* v. *U. S.* (1895), 156 U. S. 185, 190, 15 S. Ct. 325, 328, 39 L. Ed. 390. The indictment in that case was for smuggling, and in comparing the statutes there involved with section 5431 of the Revised Statutes, and in referring to the latter, this Court held:

> "The purpose of the statute in that case is the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals. Hence it is not sufficient to charge that a party is trying to defraud an individual, and, in carrying that fraud into execution, uses a bond or note of the United States which he may suppose to be genuine, but which in fact is counterfeit. For that discloses no criminal intent in respect to the bond, or note, but only a criminal intent as against the individual sought to be defrauded, an intent which may exist independent of any knowledge or character of the bond or note."

The essence of this decision is, we think, that the statute punishes the crime of counterfeiting and has no relation to fraudulent indorsements, assignments, or transfers of genuine instruments. The criminal intent must be in respect to *the instrument itself* and not as against any individual sought to be defrauded by means of a genuine government obligation.

Sections 5413, 5414 and 5431 of the Revised Statutes were placed in the Criminal Code as respectively sections 147, 148 and 151, and in 1926 were incorporated in the present United States Code, Title 18, as, respectively, sections 261, 262 and 265 within chapter 7, which is headed **"Offenses against Currency, Coinage, etc."** Section 262 is entitled: **"Counterfeiting Securities."**

We have made a somewhat extended reference to these earlier statutes, and to the decisions thereunder, to show that the use of the word *forge*, in section 148, when applied to any of the obligations mentioned in section 147, implies that it is *in imitation of, or purports to be*, such an instrument and to have been *duly issued*, when in fact it is not, and never was, genuine or valid. A forged obligation of the United States means a counterfeit thereof, and does not mean a genuine draft for money with a fraudulent indorsement thereon, because a false indorsement is not a false image of any act of the Government.

United States v. *Howell* (*supra*);
United States v. *Stewart* (*supra*);
United States v. *Turner* (*supra*);
Dunbar v. *United States* (*supra*).

There are, however, other considerations which point to the same conclusion. It has been observed that section 148 punishes one, who with fraudulent intent, falsely makes or alters *any obligation or other security of the United States*, and that section 147 quotes the very words, and precisely defines the particular instruments which the quoted words *shall be held to mean*. The definition includes, among others, "checks, or drafts for money, drawn by or upon authorized officers of the United States".

It is clear that in section 148 of the Criminal Code, Congress legislated with respect to those "obligations and securities" as are defined in section 147; and that when the present indictment charges the forging of an "obligation of the United States", it is equivalent to an allegation charging the forging of one of the particular instruments defined and included in section 147.

It is to be noted, however, that section 147, after precisely defining and enumerating the particular "obligations or other securities" which the quoted words "shall be held to mean" does not say "or any indorsement thereon", nor does the statute contain any equivalent expression.

It is admitted, of course, that the draft by Summer, the Treasury Department disbursing clerk, to Mackay, described in the present indictment, is an "obligation of the United States" within the plain meaning of section 147. The forging of such a draft is, without question, an offense under section 148.

But the indictment charges that Prussian forged "an obligation of the United States, to wit, the *indorsement* on a draft for money", and thereby charges the forging of an instrument which is not included within that definition which Congress legislated the quoted words "shall be held to mean".

It is persuasive that in the original statute contained in the Act of 1790 (1 Stat. 112, 115), and in all of the subsequent Acts which authorized the issuance of the Government's "obligations or securities", and in all of the re-enactments, re-codifications, and amendments of said statutes, Congress has never included the word "indorsement" or used any equivalent expression in penalizing the "false making, forging or counterfeiting", or "altering" of said "obligations and securities".

1 Stat. 112, 115 (April 30, 1790, Sec. 14);
3 Stat. 213, 215 (Feb. 24, 1815, Sec. 11);
3 Stat. 266, 275 (April 10, 1816, Sec. 18);
4 Stat. 115, 119 (March 3, 1825, Sec. 17);
5 Stat. 201, 203 (Oct. 12, 1837, Sec. 10);
9 Stat. 118, 120 (Jan. 28, 1847, Sec. 9);

11 Stat. 257, 259 (Dec. 23, 1857, Sec. 12);
12 Stat. 345, 347 (Feb. 25, 1862, Sec. 6);
13 Stat. 218, 221 (June 30, 1864, Sec. 10):
Revised Statutes, sections 5413, 5414;
Criminal Code, sections 147, 148;
United States Code, sections 261, 262.

If it was intended in section 148 to penalize the forgery of an indorsement upon the check described in the present indictment, as the Court of Appeals held that it did in this case, why did not Congress expressly so state by including the word in section 147? Congress did not merely forget indorsements upon the Government's checks, if such a thing were possible in the many statutes, special acts, re-enactments, re-codifications, and amendments.

Congress remembered *indorsements* and thought of them, and when they desired to penalize fraudulent indorsements upon Government instruments, they expressly so stated. For example, pension checks issued by the government are obligations or securities within the definition of section 147, and to *falsely make or alter* such a check is punishable under section 148. Yet, as evidence that Congress knew that said section did not embrace the *forging of an indorsement of a genuine pension check*, express provision was made therefor in 38 U. S. C. A. section 128 which is in the following language:

> **"Forgery of Indorsement of Pension Checks.** Whoever shall forge the indorsement of the person to whose order any pension check shall be drawn, or whoever with the knowledge that such indorsement is forged shall utter such check * * * shall upon conviction be punished * * *." (Aug. 17, 1912, c. 301, sec. 4, 37 Stat. 313.)

If the words in section 147, "checks or drafts for money" include an indorsement, the forgery of which is punishable in section 148, why was it necessary for Congress to enact the said provision of law on August 17, 1912, covering the identical offense with respect to genuine pension checks? It is worthy of note that said section is entitled: "Forgery of Indorsement of Pension Checks". It is not entitled "Counterfeiting Securities", as is section 148 of the Criminal Code. But if the Court below is correct, *both statutes* penalize the forgery of an indorsement of pension checks. We contend that there is a manifest distinction between the subject matter of the two statutes; that section 148 relates to the criminal act of falsely making the check itself and not to any writing which passes title to a genuine instrument. For this reason section 148 does not embrace the forgery of an indorsement of a genuine pension check, nor does it embrace the forgery of an indorsement of any other genuine check.

There are, also, postal notes and money orders issued by the Post Office Department. Such instruments are "obligations or securities" within the meaning of section 147, and the forgery either of postal notes or of money orders may be prosecuted under section 148. Yet Congress makes express provision for the punishment of a forged indorsement upon either class of such instruments, whether genuine or spurious. Section 218 of the Criminal Code (now 18, U. S. C. A. sec. 347) provides:

> **"Counterfeiting Money Orders.** Whoever, with intent to defraud, shall falsely make, forge, counterfeit, engrave, or print, * * * any order in imitation of or purporting to be a money order issued by the Post Office Department, or by any

> postmaster or agent thereof; or whoever shall forge or counterfeit the signature of any postmaster, chief clerk or clerk upon or to any money order, or postal note, * * * or any material signature *or indorsement thereon* * * *; or shall falsely alter * * * in any material respect * * * any such money order or postal note; or shall, with intent to defraud, pass * * * any such money order or postal note; or shall, with intent to defraud, pass * * * any such forged or altered money order or postal note, knowing any material signature *or indorsement thereon* to be false, forged, or counterfeited * * * or shall, with intent to defraud the United States, or any person, transmit or present to * * * or at any office of the Government of the United States, any money order or postal note, knowing the same to contain any forged or counterfeited signature to the same, or to *any material indorsement, receipt, or certificate thereon* * * * shall be fined * * * or imprisoned." (Italics ours.)

If the forgery of an indorsement of a genuine obligation is punishable under section 148, then this provision of law, like 38 U. S. C. A. section 128, is mere surplusage in our statute books. It is to be noted, however, that section 218 of the Criminal Code refers both to genuine and to counterfeit money orders and postal notes and that Congress, by express language, penalizes the false indorsement upon either class of said instruments.

The statutes of the several states of the Union indicate likewise that a fraudulent indorsement does not convert a genuine obligation into a counterfeit. The *forgery* statutes of forty-six states penalize the forging of an indorsement, either by express use of the word or an equivalent expression. Florida and Nebraska are the

only exceptions. In direct contrast to this, the *counterfeiting* statutes of forty-six states do not mention the word *indorsement* therein, nor do they contain any equivalent expression. The exceptions here are Maine and Illinois. For citation of statutes, see appendix.

To say that the forgery of an indorsement was intended to be embraced within section 148 of the Criminal Code would be to embrace undefined extraneous matter, and would be to depart from the particular definition to a general one. Such an interpretation would give an exceedingly liberal construction to a statute defining a felony, and violates the settled rule that the words must be interpreted in their narrower sense and must be understood to mean exactly what Congress legislated they "shall be held to mean".

U. S. v. *Salen* (1914), 235 U. S. 237, 35 S. Ct. 51, 59 L. Ed. 210;

U. S. v. *Chase* (1890), 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117;

Fasulo v. *U. S.* (1926), 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443.

If it be urged, even in the light of the history of section 148 and the decisions of this Court, that the statute was intended to embrace the forgery of an indorsement, the answer must be that the crime denounced in said section is complete even though the instrument never is indorsed. When an indorsement is forged, another and distinct offense is committed. To hold that section 148 embraces this other and distinct offense would be to write into that section an offense which Congress did not place there, and which they never intended to place there.

It is persuasive that throughout the entire history of

section 148 beginning with Act of 1816, *supra*, Congress always has associated therewith a statute which embraced the methods which might be employed in counterfeiting the government obligations and securities. Section 150 of the Criminal Code, 18 U. S. C. A., section 264, provides, among other things, as follows:

> "* * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used *in forging or counterfeiting any such obligation or other security, or any part thereof;* * * * shall be fined * * *, or imprisoned * * *." (Italics ours.)

The act of *forging*, as used in section 148, cannot be ratified, as can the act of forging an indorsement. We contend that Congress had no intention, in said section, of penalizing the forgery of an indorsement of a genuine obligation, because they were legislating with respect to a class of instruments which could not, in legal contemplation, be indorsed; they were dealing with forbidden property, contraband *per se* which was subjected to the provisions of forfeiture and search warrant. Criminal Code, sections 172, 173 (18 U. S. C. A. secs. 286, 287).

Section 148 does not cover the offense as alleged in the indictment, and, however reprehensible the act of forging an indorsement may be, the Court cannot sustain the indictment on that ground. The statute is highly penal, renders its violators liable to both fine and imprisonment, and must be strictly construed. This Court has held, on several occasions, that the purpose

of the statute is to punish the making of a certain class of instruments, namely, *counterfeits of the obligations* described in the statute. The words of section 148 do not suggest any other intention, and it is not permissible to search for an intention that the words themselves do not suggest. Full effect is given to the statute by holding that its purpose is the protection of the bonds and currency of the Government, and not the punishment of fraudulent assignments of mere choses in action.

United States v. *Howell, supra;*
United States v. *Stewart, supra;*
Dunbar v. *United States, supra;*
United States v. *Turner, supra.*

For all of the foregoing reasons, it is submitted that the answers to the first two questions presented should be in the negative.

II. Having developed up to this point and stated what might be regarded as petitioner's major affirmative argument to the effect that *section 148 does not relate to forging an indorsement of a genuine government check,* it is proper to call attention here to the contrary rulings which were relied upon by the Circuit Court of Appeals in this case.

Those cases hold that section 148 penalizes the forging an indorsement of a genuine Government check because "the obligation to pay" does not become complete until the instrument is properly indorsed. Let us consider the history and development of this extraordinary doctrine which (1) ignores the object of the statute to guard against "false paper purporting on

its face to be issued by the Government" (*U. S.* v. *Turner* (1833), 32 U. S. 132, 7 Pet. 132, 8 L. Ed. 633; *U. S.* v. *Howell* (1870), 78 U. S. 432, 11 Wall. 432, 20 L. Ed. 195), and (2) disregards the statutory definition of the word "obligation" in section 147.

The source of this extreme and unwarranted doctrine announced by some Courts is the case of *United States* v. *Jolly* (1888, D. C. Tenn.), 37 Fed. Rep. 108. The indictment in that case was brought under section 5414 of the Revised Statutes (Criminal Code, section 148) for forging an indorsement on the back of a treasury warrant issued from the Post Office Department. No objection was made that the statute referred only to counterfeited treasury warrants, but the accused took the single view that the forgery of an indorsement was not within the scope of said section. District Judge Hammond overruled this objection and said (p. 110):

> "I do not comprehend why the name of the payee is not as much a part of the instrument as that of him who, in behalf of the United States signs the warrant or check. It is conceded that it is so, as appearing on the face of the instrument, but it is denied that it is so when placed on the back of it, because, it is urged that it is then a mere private writing used for a purpose wholly independent of the warrant, and only to pass title to it."

It is to be noted that Jolly's contention is sustained by the ruling of Mr. Justice Washington in the case of *United States* v. *Stewart*, 4 Wash. C. C. 226, wherein it was held:

> "It is perfectly clear, I think, that it (forging the indorsement) does not amount to a forgery

> or alteration of *the bill or note itself*, which is the sole act of the corporation, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the note."

Judge Hammond ruled otherwise, however, in the case of *Jolly*, and said:

> "The very fact that the warrant is made payable 'to order', rather than 'to bearer', when it would pass by delivery, like a banknote, shows that the practice of so writing them is intended to bring the indorsement within the protection of the law against forgery. It constitutes about all the value there is in so writing them, and the writing the name of the payee falsely and fraudulently on the back is just as much a forgery of the instrument as any other false writing concerning it would be. It is in every legal sense a part of the instrument itself."

Omitting from present consideration the interpretation of the statute as a *forgery* statute instead of a *counterfeiting* statute, we find that here, again, the District Judge does not follow the ruling of Mr. Justice Washington to the effect:

> "That the act did not intend, by the word order, to include an assignment of a bank note, may be fairly presumed from the word check, with which it is associated; the latter meaning in common parlance, a draft payable to bearer, and it was on that account, probably, that the word was added."

The reasons for Judge Hammond's errors are (1) that he regarded section 5414 of the Revised Statutes as a

forgery statute instead of as a counterfeiting statute, and (2) in relying upon the cases of *United States* v. *Long* (1887, C. C. S. D. Ga.), 30 Fed. Rep. 678, and *Ex Parte Hibbs* (1886, D. C. Oregon), 26 Fed. Rep. 421, the District Judge believed those cases to be "*under a statute quite as general as the one we are considering*". In fact, however, those two cases involved section 5463 of the Revised Statutes, Criminal Code, section 218 (title 18 U. S. C. A. sec. 347), which expressly penalized the forging of an indorsement, in this language:

> "Any person who shall, with intent to defraud, * * * forge * * * any order in imitation of or purporting to be a money-order issued by the post office department, or any of its postmasters or agents, or any material signature *or indorsement thereon;* * * * any person who shall, with intent to defraud, pass, utter, or publish * * * as true any such false, forged, or altered money-order, knowing the same, or any signature *or indorsement thereon*, to be false, * * * shall be punished * * *." (Italics ours.)

This section is not "quite as general" as section 5414. Indeed, it is difficult to understand how the District Judge in the *Jolly* case could believe that it was, because the very cases he relied upon quote section 5463, and the words **"or indorsement thereon"** appear twice in each quotation. The failure to distinguish betwen the two sections of the Revised Statutes led to the erroneous conclusion that forging an indorsement was contemplated in section 5414.

This is a noted decision for several reasons: (1) It is the first time such a doctrine was announced in any prosecution under section 5414 (148, U. S. C. C.); (2)

it has been followed by some of the District Courts, and by the Second, Fifth and Ninth Circuits Court of Appeals; and (3) if that rule of law continues to be followed it would write into the section an entirely different and distinct offense than was contemplated by Congress, one which never was intended to be placed there.

And yet we find that the erroneous conclusion of District Judge Hammond is the source of authority in the case of *Hamil* v. *United States* (1924, C. C. A. 5), 298 Fed. Rep. 369, wherein the Court states (p. 371):

> "Section 147 of the Criminal Code includes a check such as is described in the indictment within the definition of an 'obligation or other security of the United States.' We are of opinion that section 148 punishes the forgery of an indorsement of such an obligation or security. The obligation to pay a genuine check does not become complete until it is properly indorsed. The forgery of the indorser's name is as effective a method of defrauding as is the forgery of the name of the drawer of the check."

The essence of this decision is in the sentence wherein the Court speaks of "the obligation to pay" and states that it does not become complete until the check is properly indorsed. Such statement manifests two important errors, because (1) it is a familiar rule of law that the instrument is complete upon delivery, and without indorsement, except when such instrument is drawn to the maker's own order, Uniform Negotiable Instruments Law, section 184; and (2) the Court disregards or overlooks the definition which Congress gave to the word "obligation" as used in section 148, and

applies a new definition which, in effect, writes into section 147 the words "obligation to pay", "a debt", "a duty", or "a responsibility". Such is not the legislative definition nor was it the legislative intent.

An "obligation or other security", as defined in section 147, is a certificate of indebtedness, *Sacks* v. *U. S.* (1921), 257 U. S. 37, 42 S. Ct. 38, 66 L. Ed. 118. It is an *instrument* which contains the "writings" of the Government, issued by the proper officer, under the authority of law, evidencing the pecuniary debt of the Government. *U. S.* v. *Irwin* (1851, C. C. A. 7), 5 McLean 178. Such a *certificate* or *instrument* is complete when it has passed through the required processes of engraving, printing, or writing, as the case may be.

Undoubtedly, "the forgery of the indorser's name is as effective a method of defrauding as is the forgery of the name of the drawer of the check", as stated by the Court in *Hamil's* case, *supra*, and, to the same effect, in *United States* v. *Jolly*, *supra*. But that is not enough to require the Court to hold that the forgery of an indorsement of a genuine Government check is the forging or counterfeiting of an "obligation or security of the United States" within section 148.

It is exceedingly wrong that the petitioner should, by a long train of such conclusions, be reasoned into a penalty, when the express words of section 148 do not authorize it. Penal statutes are not enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because of their resemblance, or because they may be equally and in the same way "as effective a method of defrauding"; nor can a statute be extended beyond its grammatical sense or natural mean-

ing by any such argument. Sutherland on Statutory Construction, sections 352, 355.

The plain and natural meaning of the words "falsely make, forge, counterfeit", as used in section 148, is to prevent the counterfeiting of government bonds, currency, and other instruments evidencing indebtedness. It is a strained and unwarranted construction of this highly penal statute to hold that a forged indorsement of a *genuine* instrument would fall within its comprehension merely because it is "as effective a method of defrauding". To extend the statute to govern such a state of facts would involve a train of reasoning resulting in new legislation, rather than in the construction of the existing statute. The arguments of the *Hamil* and *Jolly* cases might prevail in a civil case, but they are too indirect and forced for a criminal case.

In *Fasulo* v. *U. S.* (1926), 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443, this Court considered whether the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm was a scheme to defraud within the meaning of section 215 of the Criminal Code. Mr. Justice Butler delivered the opinion of the Court and held (p. 628, 272 U. S.):

> "Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick or false pretenses; but that is not enough to require the court to hold that a scheme based on such threats is one to defraud within section 215. While, for the ascertainment of the true meaning and intention of the words relied on regard is to be had to the evils that called forth the enactment and to the rule that a strict construction of penal statutes does not require the words to be so narrowed as to exclude cases that

> fairly may be said to be covered by them, it is not permissible for the court to search for an intention that the words themselves do not suggest. *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37. * * * There are no constructive offenses; and, before one can be punished it must be shown that his case is plainly within the statute. *United States* v. *Lacher*, 134 U. S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080."

In *United States* v. *Chase* (1890), 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117, the indictment was under section 1 of the Act of July 12, 1876, c. 186, 19 Stat. 90, declaring "every * * * book, pamphlet, picture, paper, writing, print, or other publication of an indecent character" to be unmailable, and making their deposit in the mails an offense. The question was whether to send an obscene letter by mail violated that section. This Court said that the letter was not a writing within the meaning of the statute and held (p. 261, 135 U. S.):

> "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

And see also:

> *U. S.* v. *Salen* (1914), 235 U. S. 237, 35 S. Ct. 51, 54, 59 L. Ed. 210;

France v. *U. S.* (1897), 164 U. S. 676, 17 S. Ct. 219, 222, 41 L. Ed. 595.

What evils called forth the enactment of the statute involved in the present case and what mischief was it designed to suppress? This Court (or a Justice thereof) has answered these very questions more than once. In *United States* v. *Turner* (1833), 32 U. S. 132, 7 Pet. 132, 8 L. Ed. 633, the answer was: *"It is intended to guard the public from false and counterfeit paper purporting on its face to be issued by the bank" (of the United States).* In *United States* v. *Stewart* (1818), 4 Wash. C. C. 226 (Fed. Cases No. 16402), Mr. Justice Washington answered: *"the Act* (of 1816) *did not intend, by the word order, to include an assignment"* and that *"the indorsement is not an offense within the Act."* Again, in *U. S.* v. *Howell* (1870), 78 U. S. 432, 11 Wall 432, 20 L. Ed. 195, Mr. Justice Miller of this Court held: *"The purpose of the Act was to punish the making of counterfeits of the notes or bonds described in the statute."* And finally, in *Dunbar* v. *U. S.* (1895), 156 U. S. 185, 190, 15 S. Ct. 325, 328, 39 L. Ed. 390, this Court held that the purpose of section 5431, Revised Statutes (Criminal Code, section 151) was *"the protection of the bonds or currency of the United States and not the punishment of any fraud or wrong upon individuals."*

In the light of such authoritative rulings, the decisions in the *Jolly* and *Hamil* cases, and by the Court below in the present case, are unsound and should not prevail.

III. The indictment fails to inform the accused exactly of what he is charged. It lacks that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution.

That, as we all know, is the substantial purpose of a written charge. *Potter* v. *United States* (1894), 155 U. S. 438, 39 L. Ed. 44, 15 S. Ct. 144, 146.

Does the present indictment fulfill its substantial purpose? It charges that the accused did "falsely make, forge and alter a certain obligation of the United States". This statement lacks certainty of description unless the words "falsely make, forge, and alter" mean that the accused "altered" an obligation issued by the Government. Otherwise, this general charge is impossible of performance with respect to "a certain obligation", because a "forged" instrument is one which was never issued by the Government. But whether or not that is agreed to, we think it will be admitted that the general description of the offense is insufficient unless the "certain obligation of the United States" afterwards alleged, is a bond, a draft, a check, or other instrument described and enumerated in section 147 of the Criminal Code.

The following description is given of said "obligation", to wit: "the *indorsement* on a draft" for $9,044.37. What does this mean, and is there any precision or certainty of description which would enable the accused to always use a judgment here as a bar to any other prosecution? No one will seriously contend that an *indorsement* is a certificate of the Government's indebtedness. It is only a means of transfer. To "falsely make, forge,

and alter" an obligation is to counterfeit, and is an offense against the currency of the United States; whereas to "falsely make, forge, or alter" an indorsement thereon is not counterfeiting but is an offense against the operations of the Government.

The indictment then alleges the offense to have been committed "in the following manner, that is to say: that heretofore a certain draft for the payment of money", $9,044.37, "was drawn by an authorized officer of the United States, to wit: by one J. L. Summer, Disbursing Clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, which said draft was an obligation of the United States." Then follows a description of the draft, and the indorsements on the back thereof.

It is reasonably clear from such allegations that the said draft was drawn by one authorized Government office upon another and contained the words and figures on its face and on the back, as is described. This "said draft for money", it is charged, "was *duly issued* to the said Malcolm S. Mackay." If this be true, then the "obligation" was not "falsely made or forged" as was first alleged, because a "forged obligation" is one which only purports on its face to be genuine.

The indictment concludes, "*that the said draft for money with the forged endorsement thereon did constitute together a forged obligation of the United States.*" It is to be noted that the counterfeited obligation is no longer the indorsement, as was first charged, nor is it the draft for money. It has now become the genuine draft which was "duly issued" plus the indorsement. A mere averment of the indictment has transformed two sepa-

rate "obligations of the United States" into one single instrument!

The government brief submitted to the Court below contained the statement that "the pleader, in drafting this indictment, had in mind the objection which the Circuit Court of Appeals, for the Fifth Circuit, pointed out in *De Lemos* v. *U. S.* (1899, C. C. A. 5), 91 Fed. 497." In that case, the Court held that the three counts of the indictment were fatally defective, because it was alleged that the draft itself was forged, and that a subsequent allegation that the forgery consisted in the false making of the indorsement was repugnant. The essence of the decision was that there is a clear distinction between alleging a draft to be forged and alleging an indorsement of a genuine draft to be forged. We think this distinction sound and conformable to the fundamental principles of criminal pleading.

The pleader of the present indictment did not, however, keep said distinction in mind, because he charged (1) at the outset that the obligation which was forged was an *indorsement*, whereas, (2) at the conclusion of said indictment, the obligation which was forged was the draft, because a forged indorsement was placed on the back thereof. *Which, then, is the forged obligation?*

The Court, in the *De Lemos* case, expressed the opinion that a charge could have been laid in that case under section 5421 of the Revised Statutes (now Criminal Code, section 29), and with this opinion we entirely agree. But the Court, while sustaining the demurrer to the indictment, expressed the opinion, by way of dictum, that a charge could have been laid for forgery under section 5414 of the Revised Statutes if the pleader had "distinctly charged that the genuine draft, with the forged

indorsement upon it, constitute together a forged obligation of the United States."

This view was overruled at a much later date in the case of *Gesell* v. *United States* (1924, C. C. A. 8), 1 Fed. (2d) 283, wherein the Court referred to said statement in the *De Lemos* case, and held (p. 288):

> "Now, of course, if by mere assertion or averment the assignment, which before was no part of the draft, could be made a part of that instrument, then the charge could be laid under section 5414, Rev. Stats. U. S. (now Criminal Code, Sec. 148), and by parity of reasoning in the present case the charge could be laid under Criminal Code, Sec. 151. But this all assumes the identity of the original complete obligation and the independent assignment thereof. We think this was not the intention of the Congress when it framed these three sections, each so well adapted to fill its peculiar niche, and, when taken together, so inclusive of the field under consideration, and especially in view of section 5413, Rev. Stats. U. S. (now Criminal Code, Sec. 147), which so clearly and precisely defines and enumerates the particular instruments which the words 'obligation or other security of the United States', then being considered, 'shall be held to mean'."

The Court stated that a charge of forging an indorsement on a genuine obligation "could and should have been laid under" section 29 (title 18 U. S. C. A. Sec. 73), which, so far as here applicable, provides:

> "Whoever shall falsely make, alter, forge, or counterfeit, * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or

> of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; * * * shall be fined not more than one thousand dollars and imprisoned not more than ten years."

The Court, in *Gesell's* case, after setting forth said section in full, stated as follows (p. 288):

> "Now had the pleader charged that the said Howard E. Gesell and the said Nels B. Nelson having obtained possession of a genuine obligation of the United States, to wit, a registered convertible gold note, etc., did falsely forge an order, contract and other writing on the back thereof, to wit, the words (setting out the forged instrument), for the purpose of obtaining, receiving and enabling any other person to obtain or receive from the United States, etc., a sum of money, etc., * * * certainly a charge would have been laid under said section 29, * * *."

The pleader, in the present case, could have avoided the repugnant allegations in the indictment if he had not charged the accused with "forging an obligation of the United States". The obligation described in said indictment was a genuine draft for money; it was neither falsely made, "forged", nor altered.

In the later case of *Lewis* v. *United States* (1925, C. C. A. 8), 8 Fed. (2d) 849, the Court, after discussing and approving of the decision in the *Gesell* case, said (p. 850):

> "In further support of our conclusion that sections 148 and 151 cannot be invoked in the case at bar, reference is made to the language

> of the Supreme Court in *Dunbar* v. *U. S.* (*supra*), wherein it is said that former section 5431, now section 151 of the Criminal Code, had for its purpose 'the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals'."

Further authority for the soundness of the reasoning in the *Gesell* and *Lewis* cases is to be found in *White* v. *Levine* (1930, C. C. A. 10), 40 Fed. (2d) 502, the most recent case in point. There, an indictment charging the accused with forging the payee's name on a United States Veteran's Bureau compensation check was held to be, "necessarily for an offense under section 29 of the Penal Code", because sections 148 and 151 "do not embrace forgery of an indorsement on an obligation of the government". The Court held (p. 503):

> "The indictment was necessarily for an offense under section 29 of the Penal Code, now section 73 of title 18 of the U. S. Code (18 U. S. C. A. Sec. 73), as the two sections 148 and 151 of the Penal Code, sections 262 and 265 of title 18 of the U. S. Code (18 U. S. C. A., secs. 262, 265), do not embrace forgery of an indorsement on an obligation of the government. The question has been raised and decided in *Gesell* v. *United States* (C. C. A.), 1 F. (2d), 283, and *Lewis* v. *United States* (C. C. A.), 8 F. (2d) 849. *It is our opinion that those cases are sound and should prevail over the decisions cited which hold to the contrary.*" (Italics ours.)

In the case of *United States* v. *Albert* (1891, C. C. Fla.), 45 Fed. Rep. 552 (erroneously relied upon below as authority in the Government Brief), the Court considered an indictment, the second count of which was

substantially like the present one. The contention was there made that no Federal statute penalized the forgery of an indorsement upon a pension check. The conclusion of the Court, after a review of some cases, was this (p. 557):

> "It seems to us that section 5421 is the section under which the defendant in this case should have been prosecuted for the matters contained in the second count of the indictment. However that may be, we conclude that the said second count charges that the issuance of a genuine order for the sum of $45 made and signed by M. A. Mulligan, United States pension agent, whereby the assistant treasurer of the United States at Chicago, Ill., was required and directed to pay to the order of William H. Chaddock the aforesaid sum of $45; that the aforesaid order was afterwards falsely and fraudulently altered and forged by the name of the said William H. Chaddock being falsely and fraudulently placed thereon, as his indorsement; and that afterwards, to-wit, the said Albert did utter and publish the same; *and that this count cannot be sustained under Section 5431* (Criminal Code, section 151), *because it does not sufficiently describe any falsely made, counterfeited, or altered obligation or other security of the United States.* * * * The said count is undoubtedly deficient in other respects, and is open to criticism for vagueness, uncertainty, and repugnancy." (Italics ours.)

(The statute punishing the forging of an indorsement upon pension checks was not enacted until August 17, 1912. 38 U. S. C. A. 128.)

The present indictment contains more defects than

found in any of the cases cited, in all of which, demurrers were sustained. We may summarize the allegations in this indictment as follows:

(a) Prussian counterfeited an "obligation of the United States".

(b) The "obligation" which he counterfeited was an indorsement upon a draft.

(c) The said draft was an "obligation of the United States", and was "duly issued".

(d) Prussian forged Mackay's name on the back thereof.

(e) The said draft was not a counterfeited obligation; neither was the indorsement alone a counterfeited obligation; but, both together, they constituted a "forged obligation of the United States"—even though it was "duly issued"—**"as the defendant well knew".**

The pleader was at liberty to use any form of expression, but that is subject to the limitation that he fully and clearly describe the offense; and the entire indictment is to be considered in determining whether the offense is fully and clearly stated. *Dunbar* v. *U. S.*, *supra*.

The indictment does not fulfill the substantial purpose of a written charge because it fails to inform the accused exactly of what he is charged. It lacks precision and certainty of description which would enable petitioner to always use the judgment upon it as a bar to any other prosecution. It is therefore submitted that the third question presented should be answered in the negative.

This argument having now been completed, and the same having been limited to the question whether the indictment states an offense under the Criminal Code, as specified by this Honorable Court in the order allowing certiorari, the same is respectfully submitted to the Court for consideration.

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APPENDIX.

CITATIONS OF STATE STATUTES

ALABAMA

Counterfeiting: Alabama Code of 1928, Sect. 4120.
Forgery: Alabama Code of 1928, Sect. 4121.

ARIZONA

Counterfeiting: Revised Code of Arizona (Struckmeyer), 1928, Sects. 4752-4754.
Forgery: Revised Code of Arizona (Struckmeyer), 1928, Sect. 4750.

ARKANSAS

Counterfeiting: Arkansas Digest of the Statutes (Crawford & Moses), 1919, Sects. 2466-2469.
Forgery: Arkansas Digest of the Statutes (Crawford & Moses), 1919, Sect. 2460.

CALIFORNIA

Counterfeiting: Penal Code of California (Deering), 1923, Sects. 475, 476, 480.
Forgery: Penal Code of California (Deering), 1923, Sect. 470.

COLORADO

Counterfeiting: Courtright's Mills Annotated Statutes (Colo.), 1930, Vol. 2, Sect. 1835.
Forgery: Courtright's Mills Annotated Statutes (Colo.), 1930, Vol. 2, Sect. 1832.

CONNECTICUT

Counterfeiting: General Statutes of Conn., Revision of 1930, Vol. II, Sect. 6360.
Forgery: General Statutes of Conn., Revision of 1930, Vol. II, Sect. 6358.

DELAWARE

Counterfeiting:	Delaware Revised Statutes, 1915, Sects. 4771, 4772.
Forgery:	Delaware Revised Statutes, 1915, Sect. 4773.

FLORIDA

Counterfeiting:	Compiled General Laws of Florida, 1927, Vol. 4, Sects. 7332-7334, 7343.
Forgery:	Compiled General Laws of Florida, 1927, Vol. 4, Sect. 7324.

GEORGIA

Counterfeiting:	Georgia Code, 1926, p. 1948 (Penal Code, Secs. 238-241).
Forgery:	Georgia Code, 1926, p. 1947 (Penal Code, Sect. 231).

IDAHO

Counterfeiting:	Idaho Compiled Statutes, 1919, Vol. 2, Sects. 8413, 8414.
Forgery:	Idaho Compiled Statutes, 1919, Vol. 2, Sects. 8408.

ILLINOIS

Counterfeiting:	Smith-Hurd Illinois Revised Statutes, 1929, Sects. 279, 285.
Forgery:	Smith-Hurd Illinois Revised Statutes, 1929, Sect. 277, p. 1003.

INDIANA

Counterfeiting:	Burns Annotated Indiana Statutes (Watson's Revision), 1926, Vol. 1, Sects. 2957-2961.

Forgery: Burns Annotated Indiana Statutes (Watson's Revision), 1926, Vol. 1, Sect. 2946.

IOWA

Counterfeiting: Code of Iowa, 1927, Sects. 13142, 13143, 13151, 13152.

Forgery: Code of Iowa, 1927, Sect. 13139.

KANSAS

Counterfeiting: Revised Statutes of Kansas, 1923, Chs. 21, 608-612, pp. 375, 376.

Forgery: Revised Statutes of Kansas, 1923, Chs. 21, 602, p. 375.

KENTUCKY

Counterfeiting: Carroll's Kentucky Statutes (Baldwin's Revision), 1930, Sects. 1192, 1193.

Forgery: Carroll's Kentucky Statutes (Baldwin's Revision), 1930, Sect. 1185.

LOUISIANA

Counterfeiting: Marr's Annotated Revised Statutes of Louisiana, 1915, Vol. 1, pp. 593-595 (Rev. Stat. 834-840).

Forgery: Louisiana Statutes (Marr's Annotated Revision), Supplement, 1916-24, p. 367 (Rev. Stat. 833).

MAINE

Counterfeiting: Revised Statutes of Maine, 1930, p. 1560 (Ch. 132, Sects. 2, 6, 7).

Forgery: Revised Statutes of Maine, 1930, p. 1559 (Ch. 132, Sect. 1).

MARYLAND

Counterfeiting: Annotated Code of Maryland (Bagby), 1924, Vol. 1, pp. 986, 987 ("Crimes & Punishments", Sects. 49, 50).

Forgery: Annotated Code of Maryland (Bagby), 1924, Vol. 1, p. 985 ("Crimes & Punishments", Sect. 44).

MASSACHUSETTS

Counterfeiting: Mass. General Laws, 1921, Vol. 2, p. 2730 (Ch. 267, Sects. 12, 13).

Forgery: Mass. General Laws, 1921, Vol. 2, p. 2728 (Ch. 267, Sect. 1).

MICHIGAN

Counterfeiting: Mich. Compiled Laws of 1915, Vol. 3, Sects. 15435-15440 (Ch. 258, Sects. 4-9).

Forgery: Mich. Compiled Laws of 1915, Vol. 3, Sect. 15432 (Ch. 258, Sect. 1).

MINNESOTA

Counterfeiting: Mason's Minnesota Statutes, 1927, Vol. 2, Sects. 10321, 10325, 10341.

Forgery: Mason's Minnesota Statutes, 1927, Vol. 2, Sect. 10322.

MISSISSIPPI

Counterfeiting: Mississippi Code, 1930, Vol. 1, Sects. 941-943.

Forgery: Mississippi Code, 1930, Vol. 1, Sect. 932.

MISSOURI

Counterfeiting: Missouri Revised Statutes, 1919, Vol. 1, Sects. 3431, 3432.

Forgery: Missouri Revised Statutes, 1919, Vol. 1, Sect. 3422.

MONTANA

Counterfeiting: Montana Revised Codes, 1921, Vol. 4, Sects. 11360, 11361, 11365.

Forgery: Montana Revised Codes, 1921, Vol. 4, Sect. 11355.

NEBRASKA

Counterfeiting: Nebraska Compiled Statutes, 1922, Sects. 9685, 9686.

Forgery: Nebraska Revised Statutes, 1922, Sect. 9683.

NEVADA

Counterfeiting: Revised Laws of Nevada, 1912, Vol. 2, Sect. 6665.

Forgery: Revised Laws of Nevada, 1912, Vol. 2, Sect. 6663.

NEW HAMPSHIRE

Counterfeiting: Public Laws of New Hampshire, 1926, Vol. 2, p. 1502 (Ch. 388, Sects. 4-6).

Forgery: Public Laws of New Hampshire, 1926, Vol. 2, p. 1502 (Ch. 388, Sect. 1).

NEW JERSEY

Counterfeiting: N. J. Compiled Statutes, 1709-1910, Vol. 2, p. 1801 ("Crimes", Sect. 188).

Forgery: N. J. Compiled Statutes, 1709-1910, Vol. 2, p. 1803 ("Crimes", Sect. 197).

New Mexico

Counterfeiting:	New Mexico Statutes, 1929, Sects. 35-2304, 2305, 2309, 2310.
Forgery:	New Mexico Statutes, 1929, Sect. 35-2301.

New York

Counterfeiting:	Consolidated Laws of N. Y. (McKinney), 1917, Vol. 39 (Penal Code, Sect. 887, subd. 3).
Forgery:	Consolidated Laws of N. Y. (McKinney), 1917, Vol. 39 (Penal Code, Sect. 884).

North Carolina

Counterfeiting:	North Carolina Code, 1927, Sect. 4293.
Forgery:	North Carolina Code, 1927, Sect. 4296.

North Dakota

Counterfeiting:	North Dakota Compiled Laws, 1914, Vol. 2, Sects. 9888-9891.
Forgery:	North Dakota Compiled Laws, 1914, Vol. 2, Sect. 9883.

Ohio

Counterfeiting:	Throckmorton's Annotated Code of Ohio, 1929, Sects. 13096-13101.
Forgery:	Throckmorton's Annotated Code of Ohio, 1929, Sect. 13083.

Oklahoma

Counterfeiting:	Compiled Oklahoma Statutes, 1921, Vol. 1, Sects. 2076, 2077.
Forgery:	Compiled Oklahoma Statutes, 1921, Vol. 1, Sects. 2071.

OREGON

Counterfeiting:	Oregon Laws, 1920, Vol. 1, Sects. 1997-2000.
Forgery:	Oregon Laws, 1920, Vol. 1, Sect. 1996.

PENNSYLVANIA

Counterfeiting:	Purdon's Penna. Statutes, 1930, Title 18, Sects. 3611, 3612.
Forgery:	Purdon's Penna. Statutes, 1930, Title 18, Sect. 3631.

RHODE ISLAND

Counterfeiting:	Rhode Island General Laws, Revision of 1923, Part 2, p. 1715 (Chap. 398, Sects. 2-5).
Forgery:	Rhode Island General Laws Revision of 1923, Part 2, p. 1714 (Chap. 398, Sect. 1).

SOUTH CAROLINA

Counterfeiting:	Code of Laws of South Carolina, 1922, Vol. 2, Sect. 454, 455.
Forgery:	Code of Laws of South Carolina, 1922, Vol. 2, Sect. 99.

SOUTH DAKOTA

Counterfeiting:	Compiled Laws South Dakota, 1929, Vol. 1, Sects. 4185, 4186.
Forgery:	Compiled Laws South Dakota, 1929, Vol. 1, Sect. 4180.

TENNESSEE

Counterfeiting:	Tennessee Annotated Code (Shannon), 1918, Vol. 5, Sect. 6598.

Forgery: Tennessee Annotated Code (Shannon), 1918, Vol. 5, Sect. 6596.

TEXAS

Counterfeiting: Vernon's Annotated Criminal Statutes of the State of Texas, 1925, Vol. 2, p. 170 (Penal Code, Arts. 981-983).

Forgery: Vernon's Annotated Criminal Statutes of the State of Texas, 1925, Vol. 2, p. 174 (Penal Code, Art. 992).

UTAH

Counterfeiting: Compiled Laws of Utah, 1917, Vol. 2, Sects. 8275, 8276, 8280.

Forgery: Compiled Laws of Utah, 1917, Vol. 2, Sect. 8270.

VERMONT

Counterfeiting: General Laws of Vermont, 1917, Sect. 6905.

Forgery: General Laws of Vermont, 1917, Sect. 6902.

VIRGINIA

Counterfeiting: Virginia Code of 1930, Sects. 4487, 4488.

Forgery: Virginia Code of 1930, Sect. 4489.

WASHINGTON

Counterfeiting: Remington's Compiled Statutes of Washington, 1922, Vol. 1, Sects. 2588, 2590, 2591.

Forgery: Remington's Compiled Statutes of Washington, 1922, Vol. 1, Sect. 2588.

West Virginia

Counterfeiting:	Official Code of West Virginia, 1931, p. 1477 (Crimes, Art. 4, Sects. 3, 4, 6).
Forgery:	Official Code of West Virginia, 1931, p. 1477 (Crimes, Art. 4, Sec. 5).

Wisconsin

Counterfeiting:	Wisconsin Statutes, 1929, Vol. 2, Sects. 343-58.
Forgery:	Wisconsin Statutes, 1929, Vol. 2, Sects. 343-56.

Wyoming

Counterfeiting:	Wyoming Compiled Statutes, 1920, Sect. 7287.
Forgery:	Wyoming Compiled Statutes, 1920, Sect. 7284.